

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

-----	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. Cr. 10-245 JSW
	)	
KENNETH KYLE,	)	
	)	
Defendant.	)	San Francisco, California
	)	Thursday, July 22, 2010
-----	)	(14 pages)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:	MELINDA L. HAAG, Esq. United States Attorney 450 Golden Gate Avenue San Francisco, California 94102
BY:	OWEN PETER MARTIKAN Assistant United States Attorney
For Defendant:	David M. Bigeleisen Law Office 101 Howard Street Suite 310 San Francisco, California 94105
BY:	DAVID MICHAEL BIGELEISEN

1 Thursday, July 22, 2010

2  
3 (Defendant present in court.)

4 DEPUTY CLERK: Cr. 10-245, United States vs.  
5 Kenneth Martin Kyle.

6 Counsel, please step forward and state your  
7 appearances.

8 MR. MARTIKAN: Good afternoon, your Honor. Owen  
9 Martikan for the United States.

10 THE COURT: Good afternoon.

11 MR. BIGELEISEN: David Michael Bigeleisen for  
12 Mr. Kyle. Mr. Kyle is coming right now.

13 THE COURT: Very well. Good afternoon.

14 Good afternoon, Mr. Kyle.

15 THE DEFENDANT: Good afternoon, Sir.

16 THE COURT: So what is the status of this case?  
17 And how can we move the case forward? This is the second  
18 case, correct?

19 MR. BIGELEISEN: Very well, your Honor. Your  
20 Honor, Mr. Martikan gave me a large amount of discovery  
21 approximately eight weeks ago. And I've gone through most  
22 of it. I've been going through it more slowly than I  
23 expected to because I had a very bad fall and was injured  
24 and it slowed me down.

25 Just a few days ago, he gave me some additional

1 discovery which I haven't had a chance to look at yet.

2 And there is a companion case in state court in Missouri.

3 I spoke with the prosecutor in the Missouri case this  
4 morning, and she said to me that there was a large amount  
5 of material that she had given to the government.

6 Mr. Martikan and I spoke just a few minutes ago. He said,  
7 That's very interesting; I haven't received it yet. But  
8 he and I both agree that we would both like to see what it  
9 is.

10 Let me also remark on this in another way. There  
11 have been three searches that are critical in this case:  
12 The first search of Mr. Kyle's apartment, the second of a  
13 computer notebook and a cell phone at the airport when he  
14 entered the country, and then a third search of his  
15 apartment again. And we're interested to find out whether  
16 there was a Fourth Amendment violation in any of these,  
17 and what effect it will have on the case.

18 My thought -- and I'm not prepared to be bound by  
19 this -- but my thought is that it's the first search that  
20 I'm most interested in. And we need to do some figuring  
21 out about the electronic investigation that the government  
22 did in order to be able to prepare that in a way that will  
23 be helpful to the Court.

24 So that's where we stand right now.

25 THE COURT: All right. Before I hear from you,

1 Mr. Martikan, what concerns the Court to some extent is  
2 that the last time we met was in April, about three months  
3 ago. Almost -- close to the day. April 29th was the last  
4 setting of this case, and it doesn't sound like there's  
5 been an awful lot of progress made toward getting the case  
6 ready for the next stage. It seems like virtually nothing  
7 has happened, and you have all these searches I'm told  
8 about and discovery that even the government was not aware  
9 of, and from what defense counsel is saying, which the  
10 court accepts, we're going to need to do a lot more  
11 digging -- you don't even have -- the government doesn't  
12 even have all the information which would be necessary to  
13 tee up any alleged constitutional violations. We're not  
14 even in a position to set a motion schedule. So with that  
15 challenge, what do you have to say about that?

16 MR. MARTIKAN: Well, let me take those searches  
17 one by one. Because to talk about the first search, which  
18 counsel said he's most interested in, all that information  
19 is done. That -- the computer and the media that were  
20 seized during that search have all been analyzed, reports  
21 have been prepared. It's ready for the defense expert to  
22 look at, pursuant to the protective order. The reports  
23 have all been done. That's actually finished. It took a  
24 long time because there was a very large amount of data on  
25 the computer. But that's done.

1           The second search at the airport, that work was  
2 actually the first work to get done in this case. So  
3 that -- those reports have been done. And again, under  
4 the protective order, that media is ready to be looked at  
5 by defense counsel and his expert.

6           The third search, that -- there's a laptop  
7 computer that was seized during that search. That  
8 preliminarily has been looked at. It was -- it wasn't  
9 searched before the recent CDT protocol came out, but it  
10 was searched in about a -- six weeks ago is when that  
11 started. My understanding is there's no contraband on  
12 that computer. So they're making sure there's no evidence  
13 on there. And then -- I think the intention is just to  
14 return it.

15           THE COURT: All right.

16           MR. MARTIKAN: Now, what else is going on in this  
17 case is that there's some evidence that has been dug up by  
18 state authorities in Missouri, which I don't know what it  
19 is. Frankly, I'm happy to hear that they're sending me  
20 something because that's the first I've heard of that.  
21 And it's been a -- tough going getting things out of  
22 there. But -- I'm talking about the county now, not the  
23 federal people in Missouri.

24           THE COURT: And there's also a federal  
25 prosecution, parallel federal prosecution in Missouri?

1 MR. MARTIKAN: There is, but there's nothing  
2 pertaining to this defendant over there. That evidence is  
3 actually all here.

4 THE COURT: All right.

5 MR. MARTIKAN: Now -- so I actually think -- I  
6 don't know, I can't speculate what we might get from  
7 Missouri. But I think it would be -- I don't think it  
8 would pertain to a motion to suppress. I'm sure there'd  
9 be some evidence, discoverable evidence, but not anything  
10 pertaining to those searches.

11 THE COURT: All right. So to unpackage that --  
12 what you just said -- so the next step would be, from the  
13 government's perspective, is to turn over the results of  
14 the two searches, correct?

15 MR. MARTIKAN: Well, actually, there's nothing to  
16 turn over because we've turned over what we can turn over.  
17 It's really, you know, when the defense is ready with  
18 their expert to come and look at the actual contraband  
19 itself.

20 THE COURT: What about the report?

21 MR. MARTIKAN: That has been -- I think the  
22 report for the first search was among the material was  
23 most recently turned over.

24 THE COURT: So you would say, the government's  
25 position is then that in effect, as of today, other than

1 this alleged evidence from Missouri that's supposedly  
2 being sent by state authorities to you, Mr. Martikan,  
3 apparently the ball is really in the defendant's court to  
4 have his expert review the original alleged contraband and  
5 the report of the government's expert? Is that correct?

6 MR. MARTIKAN: Yes, that's correct. I mean,  
7 there's going to be -- there may be more discovery coming  
8 in from Missouri. The discovery that was very recently  
9 turned over besides that report is what we finally got  
10 from the SFPD, their reports from their search. That's  
11 been turned over. So -- that was turned over recently.  
12 So I think they need some time to look at that, but beyond  
13 that, the bulk of the time is going to be for the defense  
14 to take a look at the actual evidence.

15 THE COURT: Have the reports that relate to the  
16 searches, either whether they're -- these are warrantless  
17 searches?

18 MR. MARTIKAN: No, Search Number 1 was a -- was  
19 done pursuant to a state warrant.

20 THE COURT: All right. And that information, the  
21 warrant and the affidavit, report of it, have been  
22 disclosed to the defendant?

23 MR. MARTIKAN: Yes. And that, the reports for  
24 that were just most recently turned over.

25 THE COURT: And the second one?

1 MR. MARTIKAN: The second one was a border  
2 search. And that evidence was actually the earliest that  
3 was processed and produced.

4 THE COURT: So that was a warrantless border  
5 search?

6 MR. MARTIKAN: Correct.

7 THE COURT: And has the information, the report  
8 relating to that search been disclosed to the defendant?

9 MR. MARTIKAN: Yes.

10 THE COURT: And the third one, you're believing  
11 that that information, the computer will be returned and  
12 that will not be an issue in the case, correct?

13 MR. MARTIKAN: That's my expectation, because the  
14 third warrant, that was a federal search warrant search.  
15 There was a laptop that was seized that I -- my  
16 understanding is has no contraband on it, and maybe has no  
17 evidence. So it probably will be returned.

18 Some other things were seized. The papers  
19 were -- have been produced. Some objects were seized for  
20 DNA testing. And that was actually -- we're waiting for a  
21 sample of the infant victim's DNA from Missouri to compare  
22 with the DNA on that.

23 THE COURT: All right.

24 MR. MARTIKAN: Those objects.

25 THE COURT: So, Counsel, with that information,



1 the information with respect to the searches, either  
2 having been made available or soon to be made available,  
3 and -- I mean, the purported bases for the searches,  
4 either the warrant or the report relating to the boarder  
5 search, why can't we set a date for the filing of motions  
6 to suppress, if that's what the defendant is intending to  
7 do?

8 MR. BIGELEISEN: Well, let me perhaps answer why  
9 we can't. And that is the first search which was done by  
10 the San Francisco Police Department was based on  
11 information that the FBI gave to the San Francisco Police  
12 of some information that they had gathered electronically,  
13 and we are in the process of puzzling that out to find out  
14 whether that evidence-gathering was a trespass upon the  
15 Fourth Amendment or not. And we don't really know whether  
16 we have everything that we need for that or not.

17 And that is our beginning points.

18 Moving ahead a little bit, if the search that was  
19 made by the San Francisco Police Department is defective,  
20 then it may be that all of the remaining  
21 information-gathering will fall as well, including that in  
22 Missouri. And so if that's the case, then it would be  
23 good to have inventory of what it is that has been adduced  
24 in Missouri so that we can inform the Court of what we  
25 would like to have suppressed. So -- I share that with

1 you so you'll understand what our concerns are.

2 Let me also digress to say that I think that the  
3 government has been reasonably diligent in being  
4 forthcoming in providing these things to us, and so I  
5 don't want the Court to think that we're saying other than  
6 that.

7 That having been said, I spoke with Mr. Martikan,  
8 and if it pleases the Court, I think that we should be  
9 ready to come back on September 23rd to say that we're  
10 ready to set dates.

11 THE COURT: That's too long. The defendant's in  
12 custody. And although the charges are serious, with two  
13 excellent counsel being involved on the two sides working  
14 together to get the information ready, to come back just  
15 to say we're going to push the case out even further is  
16 not acceptable to the Court. Because we're talking really  
17 about -- and I'm not criticizing you, Counsel, you need to  
18 get the information -- but both of you need to work  
19 together to get this information in a position where we  
20 can litigate the constitutional issues. And it's,  
21 realistically, given the Court's schedule -- we're not  
22 talking about a big variance of -- I'm talking about  
23 bringing you back in early September to set dates. So  
24 that gives you roughly six or so weeks to get this done.  
25 And it means, and it's intended to mean, that you need to

1 give this, both sides, need to give this a high priority.  
2 It's a serious case with a lot of complicated issues and a  
3 lot of intersecting sovereigns, if you will, and agencies,  
4 and you need to work together, and the government needs to  
5 work harder to get you the information that you need to  
6 file.

7 Now, if the date has to be -- we'll be coming  
8 back in early September, presumptively to set dates. What  
9 I'm going to want -- we'll set a date. And in a  
10 reasonable amount of time before that date, I want a joint  
11 status report, by the parties, in a clean form, about  
12 the -- your progress. And in either event, I'll bring you  
13 back in September, and it will be presumptively to set  
14 dates, but if not, I'm going to want to hear, with a high  
15 level of precision, a briefing schedule.

16 Whether it's set on that next date or some other  
17 date, I don't want to have some sort of free-floating  
18 anxiety to see where you are. I want this case on the  
19 front burner.

20 So, Miss Ottolini, let's -- perhaps September 2nd  
21 will be the next -- do we have time on our calendar?

22 DEPUTY CLERK: Yes.

23 MR. BIGELEISEN: Your Honor, I have a court  
24 appearance in state court at 1:30 on the 2nd. Is the  
25 Court available in the morning?

1 THE COURT: Well, where is -- across the street?

2 MR. BIGELEISEN: No, in Redwood City.

3 THE COURT: Okay.

4 MR. BIGELEISEN: Frankly, that was one of the  
5 reasons we suggested the 23rd was we had simply compared  
6 calendars.

7 THE COURT: That's still too long. I do want to  
8 set this earlier to get us on a briefing schedule. So can  
9 we specially-set this at 10:00 in the morning or 9:00 in  
10 the morning on that date? Make it 9:00, to give counsel  
11 more than enough time to get down to Redwood City.

12 MR. BIGELEISEN: That would be fine.

13 THE COURT: Are we in trial then, Miss Ottolini?

14 DEPUTY CLERK: No.

15 THE COURT: All right. So what about that?

16 MR. MARTIKAN: That's fine, your Honor.

17 THE COURT: Should be a short proceeding, because  
18 the work will have been done, and I'll want one week  
19 before -- okay, more time, by Monday of that week, which  
20 would be August what?

21 DEPUTY CLERK: August 30th.

22 THE COURT: The 30th, I'd like a joint status  
23 report. And that status report should include a briefing  
24 schedule and a proposed hearing date for the motions to  
25 suppress, and you can indicate as much as you know, how

1 much time it's going to take, will there need to be an  
2 evidentiary hearing. I know that may be contested, but  
3 you can give me your position and the government can give  
4 me their position so we'll know how many witnesses to  
5 prepare for and whether we need to specially set the  
6 hearing on the motion. All right?

7 MR. BIGELEISEN: Very well.

8 THE COURT: All right. And let me ask defense  
9 counsel: Is this time appropriately excluded from the  
10 Speedy Trial Act?

11 MR. BIGELEISEN: Absolutely, for effective  
12 representation.

13 THE COURT: All right.

14 MR. BIGELEISEN: Yes, Sir.

15 THE COURT: Effective preparation.

16 So, Mr. Martikan, do you agree, and will you  
17 prepare the appropriate findings in the proposed order?

18 MR. MARTIKAN: I will, and I agree, your Honor.

19 THE COURT: Again, looking to counsel, you've  
20 heard the Court, I know there's -- there are things  
21 arising that neither side anticipated, and the case is  
22 very complex, but I think I've given you enough time. You  
23 at least have identified the issues before the Court to  
24 work together to get all the information. And I know  
25 sometimes you don't have control over state sovereigns.

1 But the Court's position is at some point the government's  
2 going to have to decide, you know, what it's going to go  
3 on and what it's going to rely on, and some of it may not  
4 be within your power to choose because if there's  
5 something that you aren't getting which may impact  
6 something that you are using, then you'll have to take  
7 that into account in how this case is prosecuted.

8 All right?

9 All right. So I think counsel have their, if you  
10 will, marching orders, and we'll make progress. I'll get  
11 the status report, and then we'll set a hearing date, a  
12 briefing schedule, and -- commensurate with counsels'  
13 schedule and the Court's -- and we'll go from there. All  
14 right?

15 MR. BIGELEISEN: Thank you very much, your Honor.

16 MR. MARTIKAN: Thank you, your Honor.

17 MR. BIGELEISEN: Thank you, Counsel.

18 (Adjourned)

19 oOo  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, Connie Kuhl, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into written form.



Connie Kuhl, RMR, CRR  
Monday August 13, 2012